

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARVIN RANDALL CHAPLIN,

Defendant and Appellant.

D041825

(Super. Ct. No. SCN123756)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E. Mills, Judge. Affirmed in part and reversed and remanded in part.

A jury found Marvin Randall Chaplin guilty of four counts of robbery (Pen. Code, § 211) and, after he waived jury, in a bifurcated hearing the court found he had five strikes (Pen. Code, § 667, subds. (b)-(i)), two prior serious felony convictions (Pen. Code, § 667, subd. (a)), and two prior prison terms (Pen. Code, § 667.5, subd. (a)). The court struck the prison priors, denied a motion to dismiss the strikes, and sentenced him to 110 years to life in prison: four consecutive terms of 25 years to life for robbery plus five

years for each serious felony prior. Chaplin appealed and this court reversed the sentence and remanded for resentencing. (*People v. Chaplin* (Sept. 9, 2002, D038872) [nonpub. opn.].) On remand, the trial court denied the motion to dismiss the strikes and imposed the same sentence. Chaplin again appeals, contending it is unclear whether the court exercised its discretion on the question of selectively dismissing strikes and that it abused its discretion by refusing to dismiss any of them. We again remand for resentencing.

### THE FIRST SENTENCING AND APPEAL

We need not recite the underlying facts, which are set forth in this court's prior opinion. (*People v. Chaplin, supra*, D038872 at p. 2.) In that appeal, Chaplin contended the sentencing court was unaware it had the power to dismiss strikes on a count-by-count basis; that is, to dismiss some of the strikes as to some of the counts. (*Id.* at pp. 2-3.) The People conceded the point, but asserted that it would have been an abuse of discretion to dismiss any of the strikes in light of Chaplin's criminal history. (*Id.* at p. 3.) After carefully reviewing the entire record, this court noted that the sentencing court "believed a sentence of 38 to 48 years was sufficient . . . but felt that the three strikes law left it with no middle ground. It felt it had to sentence Chaplin to prison for either 26 to 28 years or 110 years. The court was bothered that it was going to cost 'the taxpayers a couple million dollars' and did not feel that the drafters of the three strikes law intended to imprison 100 year olds."<sup>1</sup> (*Id.* at pp. 4-5, fn. omitted.) This court determined that the sentencing court was mistaken as to the scope of its discretion; in the interest of justice, it

---

<sup>1</sup> At the time of initial sentencing, Chaplin was 45 years old.

could have dismissed all but two of the strikes as to one count of robbery and imposed a term of 25 years to life, enhanced by 10 years for the serious felony priors and two years for the prison priors, and imposed consecutive one-year terms on one or all three of the additional robbery convictions (one-third the middle term). (*Id.* at p. 5.) This court concluded: "Given the trial court's concerns here, appellant's relatively nonviolent history and his addicted status, we cannot say as a matter of law it would have been an abuse of discretion to find a term of less than 100 years was in furtherance of justice." (*Ibid.*)

### PROCEEDINGS ON REMAND

The sentencing hearing after remand began on February 14, 2003. At the beginning of the hearing, the court stated that it had been aware it had the power to dismiss strikes on a count-by-count basis. Then, astonishingly, it said, "even if I wanted to, could I impose another sentence or sentence different from that which I imposed on September 28 of 2001? I suspect I cannot because I wasn't mistaken as to what I could do. So I don't think he gets a chance to come back two years later and get resentenced." The court asked for the thoughts of the deputy district attorney, who repeated a basic principle of criminal appellate procedure: this court's prior opinion vacated the sentence, requiring the trial court to sentence Chaplin anew. Then, expressing disagreement with the statement in this court's prior opinion regarding Chaplin's "relatively nonviolent history," the deputy district attorney argued that "[h]e has four crimes that are all defined as violent as a matter of law." The court responded: "I can tell you what happened

probably. The research lawyer missed it and the justices clearly don't read all this stuff. They just read the research lawyers['] things normally. It's just a mistake."<sup>2</sup>

After hearing argument, the court said, "I feel like there are people who know more about the three strikes law than I do but not very many. . . . [¶] The problem in this case is that I didn't see . . . and I don't see now how any judge can legitimately . . . dismiss any of the strikes for any purpose. That is the problem that I had last time. I don't think a sentence of 110 years is a very good idea. It's not practical, and it costs us too much money to keep people like Mr. Chaplin in jail. Eventually it will get fixed hopefully by the Legislature, not some court." After listening to further argument, it noted that it had not wanted to impose the 110-year sentence, but it had believed it had no choice and the sentence was legally required. It also observed that "the law probably requires that I give you the 110, but the Court of [Appeal] seems to think it does not" and "has invited me to give you a lesser sentence." After saying, "If I feel that I can legally give you less time, I probably will," it continued the hearing to February 21.

At the outset of the February 21, 2003 hearing, the court stated, "I am right back where I was in September. I don't want to give Mr. Chaplin the time, but I don't think I have a choice. So that the Court of Appeal can understand it, I recognize I have a right to strike priors on a count by count basis. I just don't think it's the right thing to do. [¶]

---

<sup>2</sup> As noted above, the statement in this court's prior opinion was that Chaplin's history was *relatively* nonviolent, not that it was nonviolent. Chaplin's offenses here were four robberies, committed while he was on parole for four prior robberies. During one of the earlier robberies, his accomplice fired a shotgun. During the instant robberies, he told the victims that he had a gun. (*People v. Chaplin, supra*, D038872, at p. 2.)

Unfortunately, I sort of like Mr. Chaplin and would like to be able to do something else for him, but I don't think I can." The court listened to argument, during which it commented that "the three strikes law . . . has got a lot of flaws, but I am going to follow it." The court said it did not dispute defense counsel's statement that 42 years was a fair sentence, but it did not know what basis it would have for dismissing a strike and that Chaplin was "a victim of the three strikes law as much as the . . . victims of [his] crimes were victims." The court then expressed its disagreement with the statement in this court's opinion that Chaplin had "a relatively nonviolent history" (*People v. Chaplin*, *supra*, D038872 at p. 5) but told him "I don't think you ought to get this much time." It sentenced him to 110 years to life.

## DISCUSSION

Chaplin contends it is unclear whether the court ultimately exercised its discretion on the question of selectively dismissing strikes or whether it improperly concluded that it was legally foreclosed from such dismissal. He argues there "is no way to reconcile the court's belief the [110-year] sentence was 'too long' with the decision to deny the motion to dismiss." He argues that the court abused its discretion by refusing to dismiss any of the strikes.

The sentencing court here had the legal authority to impose the sentence it did. Furthermore, it stated that it knew it had the discretion to dismiss strikes as to subordinate counts and to impose a lesser sentence, or not to dismiss strikes. (*People v. Garcia* (1999) 20 Cal.4th 490, 492-493, 499-504.) While the record reflects that the court did not dismiss any strikes, its reasons are ambiguous. In essence, its stated basis for

declining to dismiss strikes was that it could not do so and that dismissing them was not "the right thing to do." Disturbingly, it continually expressed the belief that while Chaplin did not deserve a sentence of 110 years to life, such a sentence was legally required. Because the reason for the sentencing court's decision is unclear, we are unable to determine whether it exercised its discretion concerning the strikes.

In determining whether to exercise its discretion to dismiss strikes in furtherance of justice under Penal Code section 1385, subdivision (a), the sentencing court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 158-161; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-531.) "[A] defendant's sentence is also a relevant consideration when deciding whether to strike a prior conviction allegation; in fact, it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences." (*People v. Garcia, supra*, 20 Cal.4th at p. 500.)

Normally, a sentencing court is not required to state reasons for deciding not to dismiss strikes. (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 960.) Here, however, we invite the sentencing court to do so because we cannot otherwise determine whether it exercised its discretion. This case involves what is effectively a sentence of life without possibility of parole. Because this is such a serious matter, it is important for the

sentencing court to express clearly what it is (or is not) doing and why it is (or is not) doing it.

Finally, we are troubled by the sentencing court's notion that on remand it could not impose a different sentence, its apparent lack of a careful reading of the prior opinion in this case, and its refusal to accept that it was bound by that opinion. On this second remand, we invite the sentencing court to read this opinion carefully, along with the applicable case law; consider anew whether to exercise its discretion to dismiss any of the strikes; and articulate its reasoning clearly. In view of our conclusion, we need not address Chaplin's contention that the court abused its discretion by refusing to dismiss any of the strikes.

#### DISPOSITION

The convictions are affirmed. The sentence is reversed and this matter is remanded for resentencing consistent with this opinion.

---

McCONNELL, P. J.

WE CONCUR:

---

BENKE, J.

---

HUFFMAN, J.